

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)

U.S. Army, (b) (6))

Headquarters and Headquarters Company, U.S.)

Army Garrison, Joint Base Myer-Henderson Hall,)

Fort Myer, VA 22211)

**DEFENSE REPLY TO
PROSECUTION RESPONSE TO
DEFENSE MOTION TO
REQUIRE NON-EX PARTE
FILING BY GOVERNMENT**

29 May 2012

RELIEF SOUGHT

1. In accordance with the Rules for Courts Martial (RCM) 905, Military Rule of Evidence (MRE) 505, Manual for Courts-Martial (MCM), United States, 2008; and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court require the Government to file a non-*ex parte* version of its motion for substitutions under MRE 505(g)(2) IAW MRE 505(i)(4)(A).

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. RCM 905(c)(2)(A). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

EVIDENCE

3. The defense has no additional evidence for the Court to consider along with this reply.

FACTS

4. The defense has no additional facts for the Court to consider along with this reply.

LEGAL AUTHORITY

5. There is no additional legal authority for the Court to consider along with this reply.

ARGUMENT

6. It is important to note that the defense does not seek the disclosure of the Government's Motions for Substitution to the Court. We seek only a non-ex parte summary of those motions. That non-ex parte summary will then allow the defense to (1) better understand the decision the Court is making with regard to the potential substitutions and (2) provide input on that decision to the Court.

7. It must also be noted that the government's declaration of privilege is immaterial to the claim of the defense. It is the position of the defense that, if the government seeks substitutions of privileged material under MRE 505(g), then it must provide a non-privileged summary of the action it requests to the defense.

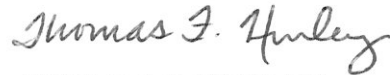
8. The construct of the Navy-Marine Corps Court of Military Review's decision in US v. Lonetree, 31 M.J. 949 (NMCCMR 1990) is not dicta. It is controlling. In Lonetree, the government sought the Limited Disclosure protections of MRE 505(g)(2). The NMCCMR held that MRE 505(i)'s procedures "contains the standard to be employed by the military judge to determine when classified information must be disclosed to the defense." One of those procedures is the standard in MRE 505(i)(4), another is the government's demonstration of national security nature of the information in MRE 505(i)(3), and another is the overall procedure described in MRE 505(i)(4)(A). The last procedure contains the relief we seek – a non-ex parte disclosure by the government which allows the defense to participate in the process with the Court.

9. The government's reliance on certain federal cases provides little direct assistance to the Court. After all, Article 46, UCMJ, provides a military accused with greater discovery rights than those enjoyed by his civilian counterparts. More helpful is the treatment of those cases by the military appellate courts. Consider the Court of Military Appeals opinion in Lonetree (US v. Lonetree, 35 M.J. 396 (CMA 1992)), it failed to see a meaningful distinction between a claim of privilege during discovery and one made during trial. See Lonetree, 35 M.J. at 409 n.10 (citing US v. Sarkissian, 841 F.2d 959 (9th Cir. 1988) and US v. Yunis, 867 F.2d 617 (DC Cir. 1989)). Thus, the government's parsing of MRE 505 between *in camera* reviews under MRE 505(g) (discovery) and *ex parte* proceedings under MRE 505(i) (confrontation) is one not shared by the highest military court.

CONCLUSION

10. In accordance with the above, the Defense requests that the Court order the Government to file a non-*ex parte* version of its motion for substitutions IAW MRE 505(i)(4)(A).

Respectfully submitted,



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